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7 FRONTIER AIRLINES, INC.

8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF NEVADA**

10 PETER DELVECCHIA, individually and as
11 next friend of A.D., a Minor,

) Case No.: 2:19-cv-01322-KJD-NJK

12 Plaintiffs,

) REPLY IN SUPPORT OF DEFENDANT
13 v.
14 FRONTIER AIRLINES, INC. and
15 JOHN DOES 1 through 5, inclusive,
16 Defendants.

) PARTIAL MOTION TO DISMISS
(DOC. # 10)

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18 **DEFENDANT FRONTIER AIRLINES, INC.'S**
REPLY IN SUPPORT OF PARTIAL MOTION TO DISMISS (DOC. #10)

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20 Defendant FRONTIER AIRLINES, INC. ("Frontier"), by its undersigned counsel, pursuant to
21 Fed. R. Civ. P. 12(b)(6), and for its Reply in Support of its Partial Motion to Dismiss, states:

22 **A. *Plaintiffs' rights to "make and enforce contracts" under Section 1981 were not thwarted.***

23 In response to Frontier's argument that Plaintiffs did not suffer an "actual loss of a contract
24 interest," Plaintiffs contend that various alleged conduct by Frontier employees amounted to an
25 impairment of their rights under the contract of carriage. Plaintiffs make this argument without
26 identifying any specific service of which they were deprived under the contract as a result of racial
27 animus. Such failure to identify specific rights allegedly lost under the contract is fatal to their claim

under § 1981. In the context of service and retail establishments, courts have declined to find § 1981 violations where the plaintiffs were “denied neither admittance nor service, nor were they asked to leave.” *Morris v. Office Max, Inc.*, 89 F.3d 411, 414 (7th Cir. 1996); *see also Harrison v. Denny’s Restaurant*, No. 96-cv-0343-PJH, 1997 U.S. Dist. LEXIS 5637, 1997 WL 227963, at *4 (N.D. Cal. Apr. 24, 1997) (“[P]laintiff has not shown that Denny’s denied him service.”); *Robertson v. Burger King*, 848 F. Supp. 78, 81 (E.D. La. 1994) (“[P]laintiff was not denied admittance nor service—his service was merely slow.”); *Stearnes v. Baur’s Opera House, Inc.*, 788 F. Supp. 375, 378 (C.D. Ill. 1992) (“Plaintiff has not provided any evidence that the manager refused Plaintiff admittance to the bar or service while he was there.”) (emphasis in original).

In the present case, Plaintiffs do not allege that they were denied boarding or denied specific services owed to them under the contract. Rather, they claim that Frontier acted out of racial animus in “concluding that Plaintiffs should not be travelling together, in concluding that their joint travel must be evidence of human trafficking or sexual deviance, in striking Peter and detaining A.D., in making false accusations against them,” and that such actions caused them to suffer emotional harm.¹ (Doc. # 1, ¶¶ 21-26) Plaintiffs rely on *Madison v. Courtney* to support their position that they have sufficiently pleaded facts evidencing an actual loss of contractual rights. 365 F. Supp. 3d 768, 773 (N.D. Tex. 2019). Their reliance on *Madison*, however, is misplaced. In *Madison*, the plaintiff demonstrated that his “first-class ticket entitled him to an offer of coat service and an offer of beverage service – both of which he claim[ed] he did not receive.” *Id.* at 773. The plaintiff in that case claimed “he was denied the full benefits of the relevant contractual relationship while all white first-class passengers were afforded the full benefits.” *Id.* That is simply not what happened in this case.

¹ We note that Plaintiffs’ Response adds facts and details regarding the alleged event that are not contained in Plaintiffs’ Complaint. For example, Plaintiffs’ Complaint simply alleges that a flight attendant “forced A.D. to leave his seat and the company of his father, and took him against his will to the rear of the aircraft.” (Doc. #1, ¶ 12.) Plaintiffs’ Response, however, argues that the flight attendant “grabbed A.D. out of his seat,” that A.D. “was ripped away from his father,” and that A.D. was “dragged to the rear of the plane.” (Doc. # 16, p. 2, 10, 11.) Similarly, Plaintiffs’ Complaint only alleges that a flight attendant “intentionally and/or recklessly touched A.D. without A.D.’s or Peter’s consent in an offensive manner.” (Doc. #1, ¶ 15.) In contrast, Plaintiffs’ Response twice asserts that A.D. was “fondled.” (Doc. # 16, p. 10, 11.) This Court should ignore all facts not pleaded in Plaintiffs’ Complaint and grant Frontier’s Partial Motion to Dismiss. *See Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (“Generally, a court may not consider material beyond the complaint in ruling on a Fed. R. Civ. P. 12(b)(6) motion.”).

1 Here, according to Plaintiffs' allegations, the flight attendants questioned Peter's relationship with
2 A.D., suspected human trafficking and sexual abuse, separated Peter and A.D. for the remainder of the
3 flight, and requested that law enforcement meet the aircraft in Las Vegas. (Doc. # 1, ¶¶ 11, 12, 16.)
4 These facts are more akin to *Morris v. Office Max, Inc.*, where the plaintiffs "were approached by police
5 officers who had been summoned by [the defendant] store's office manager to investigate two black
6 males purportedly acting suspiciously. 89 F.3d 411 (7th Cir. 1996). In *Morris*, the Seventh Circuit
7 affirmed summary judgment because the plaintiffs could not "point to specific facts showing that [the
8 defendant store] deprived them of any of the enumerated rights in § 1981 and, specifically, the right to
9 make and enforce a contract[; t]hey were denied neither admittance nor service, nor were they asked to
10 leave the store." *Id.* at 414. The same is true in this case. Frontier requested that law enforcement meet
11 the aircraft on arrival which provided Plaintiffs with an avenue to address and resolve their claims.
12 Therefore, this Court should dismiss Count I of Plaintiffs' Complaint. See *Childs v. Boyd Gaming Corp.*,
13 No. 2:18-cv-00316-GMN-VCF, 2018 U.S. Dist. LEXIS 154333, at *10-11 (D. Nev. Sep. 11, 2018) (To
14 the extent the plaintiff's claim is premised upon poor service and a disturbing atmosphere, it necessarily
15 fails.).
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17 B. *Plaintiffs' claim for intentional infliction of emotional distress (Count II) fails because the*
18 *alleged conduct was not extreme and outrageous and Plaintiffs have no factual support for*
19 *their alleged emotional distress.*

20 In their Response, Plaintiffs argue that the alleged conduct was extreme and outrageous because
21 the flight attendant should have known that Peter would be particularly susceptible to emotional distress,
22 and he should have also recognized A.D.'s "susceptibility to emotional distress given his tender age."
23 (Doc. # 16 p. 10.) Plaintiffs argue "the totality of the circumstances establishes extreme and outrageous
24 behavior." *Id.* at 10-11. Even if these allegations were true, they are insufficient to sustain Plaintiffs'
25 claim for intentional infliction of emotional distress.
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1 As Plaintiffs noted in their Response, “Nevada courts refer to the RESTATEMENT (SECOND) OF
2 TORTS § 46 for guidance in interpreting [intentional infliction of emotional distress] claims.” (Doc. #16,
3 p. 10); *Banerjee v. Cont'l Inc., Inc.*, No. 2:16-CV-669 JCM (VCF), 2016 U.S. Dist. LEXIS 141891, at
4 *15 (D. Nev. Oct. 11, 2016). The Restatement provides the following illustration for “peculiar
5 susceptibility”:

6 As a practical joke, A dresses himself in woman’s clothing in order to surprise and startle
7 B. B, who has a pathological fear of men in women’s clothing, is badly frightened,
8 becomes hysterical, and suffers a shock which results in illness. A is not liable to B
9 unless A knows of B’s peculiar susceptibility.

10 RESTATEMENT (SECOND) OF TORTS § 46 cmt. J, illus. 18.

11 In this illustration, although A acts to intentionally surprise and startle B, A is not liable to B
12 unless A knew that B had a pathological fear of men in women’s clothing. *Id.* Here, Plaintiffs’ allegations
13 are so far removed from this standard. Specifically, the flight attendants involved had no unique
14 knowledge of any peculiar susceptibilities of Plaintiff or A.D., and they only acted for the benefit of A.D.
15 Liability under this tort is reserved for those rare cases where the defendant’s conduct goes beyond all
16 possible bounds of decency, and is atrocious and utterly intolerable, which is not the case
17 here. *Westbrook v. DTG Operations, Inc.*, No. 2:05-CV-00789-KJD-PAL, 2007 U.S. Dist. LEXIS 14653,
18 at *20-21 (D. Nev. Feb. 28, 2007).

19 And, even if this Court were to consider the alleged conduct as extreme and outrageous,
20 Plaintiffs’ claim still fails because Plaintiffs have not stated sufficient facts or details to support their
21 allegation that they suffered severe or extreme emotional distress. In fact, Plaintiffs do not address this
22 issue in their Response. (Doc. #16.) Plaintiffs’ lone allegation in the Complaint - that they “suffered
23 serious ... mental injuries including, but not limited to ... mental anguish and anxiety [and] extreme
24 emotional distress” - is conclusory, making it inadequate to support their intentional infliction of
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1 emotional distress claim. (Doc. #1, ¶ 20.) Therefore, this Court should dismiss Count II of Plaintiffs'
 2 Complaint.

3 **C. Plaintiffs' claim for negligent infliction of emotional distress (Count III) fails because
 4 Plaintiffs have no factual support for their alleged emotional distress.**

5 Plaintiffs' Response regarding Count III suffers the same deficiencies as noted above regarding
 6 Count II. Plaintiffs argue the flight attendant allegedly hitting Peter and allegedly touching A.D.
 7 constitute physical impact, resulting in their suffering emotional distress. (Doc. # 16, p. 11.) But Plaintiffs
 8 do not articulate any facts or details to support their claim for emotional distress. (Doc. # 1.) The singular
 9 allegation that Plaintiffs have suffered mental injuries, including mental anguish, anxiety, and extreme
 10 emotional distress, is only a conclusion which cannot withstand a motion to dismiss. "A pleading that
 11 offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do."
 12 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A plaintiff must demonstrate more than transitory symptoms
 13 of emotional distress because unsupported, self-serving statements by a plaintiff are
 14 insufficient. *Eckenrode v. Rubin & Yates, LLC*, No. 2:13-cv-00317-GMN-PAL, 2014 U.S. Dist. LEXIS
 15 113561, at *22-23 (D. Nev. July 25, 2014). Conclusory allegations of emotional distress are insufficient
 16 to establish an award for actual damages for emotional distress. *Id.* at 22. Therefore, this Court should
 17 dismiss Count III of Plaintiffs' Complaint.

18 **D. Plaintiffs' claims for defamation and false light invasion of privacy (Count VI) fail
 19 because there was no unprivileged publication and Plaintiffs have not alleged any
 20 resulting damages.**

21 The common element of defamation and false light invasion of privacy claims is unprivileged
 22 publication to a third person. See *Pegasus v. Reno Newspapers, Inc.*, 118 Nev. 706, 714 ("Defamation is
 23 a publication of a false statement of fact."); *Huston v. Verizon Fed. Network Sys., LLC*, No. 2:07-CV-
 24 00201-BES-LRL, 2008 U.S. Dist. LEXIS 70483, at *15 (D. Nev. Sept. 17, 2008) ("One who gives
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1 publicity to a matter concerning another that places the other before the public in false light is subject to
2 liability to the other for invasion of his privacy.”). Plaintiffs’ Response fails to address how the alleged
3 conduct constituted publication.

4 Here, as per Plaintiffs’ allegations, a flight attendant accused Peter of engaging in illegal human
5 trafficking and sexual assault, informed other members of the flight crew, including the Captain,
6 regarding this matter, relayed these allegations to law enforcement, and as Peter was deplaning the
7 aircraft in Las Vegas, told him the FBI was waiting for him. (Doc. #1, ¶¶ 11, 14, 16, 17.) Even if true,
8 these allegations are insufficient to plead either defamation or false light invasion of privacy because
9 Nevada has “adopted a qualified privilege” for “communications with police in aid of law enforcement.”
10 *Pope v. Motel 6*, 121 Nev. 307, 317 (2005). Additionally, Plaintiffs have not alleged that any passenger
11 overhead the flight attendants’ accusations of Peter or their report to law enforcement, and, specifically,
12 they have not identified any passengers to whom such alleged publication was made. (Doc. # 1.) At most,
13 the passengers deplaning the aircraft with Peter overheard that the FBI was waiting to speak with him,
14 which was a true statement.

15 Finally, even if this Court were to consider the alleged conduct as unlawful or unprivileged
16 publication, Plaintiffs’ claims still fail because Plaintiffs have not stated any facts or details to support the
17 element of damages. In fact, Plaintiffs do not address this matter in their Response. (Doc. # 16.)
18 Therefore, this Court should dismiss Count VI of Plaintiffs’ Complaint.

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CONCLUSION

WHEREFORE, Defendant FRONTIER AIRLINES, INC. respectfully requests that this Honorable Court grant its Partial Motion to Dismiss and enter an Order dismissing Counts I, II, III, and VI of Plaintiffs' Complaint pursuant to Fed. R. Civ. P. 12(b)(6), and such further relief as this Court deems necessary and proper.

DATED this 19th day of September, 2019.

ROGERS, MASTRANGELO, CARVALHO & MITCHELL

/s/ Charles A. Michalek

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1 **CERTIFICATE OF SERVICE**

2 Pursuant to LR IC 4-1, I hereby certify that I am an employee of Rogers, Mastrangelo, Carvalho
3 & Mitchell, and on the 19th day of September, 2019, a true and correct copy of the foregoing
4 **DEFENDANT FRONTIER AIRLINES, INC.'S REPLY IN SUPPORT OF PARTIAL MOTION**
5 **TO DISMISS** was electronically filed with the Clerk of the Court of the United States District Court for
6 the District of Nevada using the CM/ECF system. The foregoing document was served upon the
7 following counsel of record as indicated below:

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